

State of New York

Surrogate's Court, Albany County

In the Matter of the Application of
CATHERINE L. BENSON, as
Administrator of the Estate of GUSTAVE
ANDREW BENSON, Deceased,

DECISION AND ORDER

File No. 2004-404/AV

For an Order and Relief Pursuant to SCPA
2103 for Discovery and to Recover Property
From Weitz & Luxenberg, P.C.

Appearances: Frederick M. Altman, Esq., Attorney for Petitioner Catherine L. Shufelt,
Formerly Known as Catherine L. Benson, Law Offices of Frederick M.
Altman, 6 Walker Way, Albany, New York 12205

Peter J. Moschetti, Esq., Attorney for Respondent Weitz & Luxenberg,
P.C., Anderson, Moschetti & Taffany, PLLC, 26 Century Hill Drive, Ste.
206, Latham, New York 12110

Michael E. Basile, Esq., Attorney for Robert Thomas Benson, Higgins,
Roberts & Suprunowicz, P.C., 1430 Balltown Road, Schenectady, New
York 12309

Pettit, S.,

Before this Court is a motion by respondent Weitz & Luxenberg, P.C. (hereinafter respondent), pursuant to CPLR 1003 for an order dropping Robert Thomas Benson (hereinafter Benson) as a party to the trial of this proceeding and precluding him from participating as a party on the ground that he lacks privity to maintain a cause of action against respondent. Benson has opposed the motion and it is now submitted for decision.

By way of background, Gustave Andrew Benson (hereinafter decedent) died intestate a resident of Albany County on March 13, 2004, survived by six adult children. Decedent's death was due to end-stage mesothelioma of the lung. In May 2004, decedent's daughter Catherine L. Shufelt, formerly known as Catherine L. Benson (hereinafter petitioner), entered into a retainer agreement with respondent in order to pursue a cause of action for the conscious pain and suffering and wrongful death of decedent due to injuries he sustained as a result of exposure to asbestos-related materials. Thereafter, petitioner, through respondent as counsel, commenced an administration proceeding in this Court for decedent's estate. On the administration petition, decedent's issue were identified as petitioner and her two full-blood siblings, Andrew W. Benson and John E. Benson. Petitioner's three half-blood siblings who were also decedent's children, Benson, Andrew William Benson and Jason Scott Benson, were not included.

From 2004 through 2015, this Court approved settlements in the asbestos litigation, in a net total of nearly \$1.2 million after deduction of the contingent counsel fees and disbursements, which funds were paid only to petitioner and her two full-blood siblings, as they were the only distributees identified in the administration proceeding. After learning of this situation, Benson commenced a proceeding against petitioner in this Court in May 2015, seeking distribution and relief under SCPA 2102 and EPTL 11-1.5. Respondent was not a party to that proceeding. That proceeding concluded in 2017, when the Court found that petitioner had breached her fiduciary duty to the estate and surcharged her the amount necessary to satisfy the shares of her half-blood siblings. In the Court's decision, it was noted that, "to the extent there is a claim that Weitz & Luxenberg committed legal malpractice, such claim must be brought by respondent, as the estate fiduciary and party in privity with Weitz & Luxenberg."

In July 2015, petitioner commenced this discovery proceeding against respondent, Benson and his two full-blood siblings. In February 2018, she amended her petition to specifically allege that respondent committed legal malpractice in its representation of her as the estate fiduciary. In this proceeding, petitioner requests an order directing respondent to turn over \$1,195,839.31 to decedent's estate so that such funds may be distributed to Benson and his full-blood siblings. As part of her amended petition, petitioner expressly stated in paragraph 24, "Petitioner consents to limited Letters of Administration being granted to Robert Thomas Benson and to his joining as a petitioner on this Petition should letters be issued to him." At that same time, Benson commenced a proceeding for letters of limited administration with the request that his letters be limited as follows: "Prosecution and/or adjustment or settlement of a claim or causes of action against Weitz & Luxenberg, P.C., with such prosecution being coordinated with the present administrator Catherine Shufelt f/k/a Catherine Benson or without her if her letters are revoked or terminated." Respondent, who was not a party to Benson's proceeding to be appointed as a fiduciary, filed its answer to the amended petition in this proceeding in early March 2018. In response to paragraph 24 regarding appointment of Benson and his joinder as a petitioner, respondent stated, "Respondent neither admits, nor denies, but leaves this to the discretion of the court." On March 27, 2018, letters of administration with the limitation set forth above were issued to Benson.

Respondent now argues that Benson, who never entered into a retainer agreement with respondent, lacks privity with it and, therefore, cannot maintain a claim for legal malpractice against respondent. Respondent asserts that the issuance of letters of administration to Benson in 2018 does not retroactively establish privity with respondent or allow him to participate in a legal malpractice claim against respondent.

In opposition, Benson argues that, as an estate fiduciary, he may pursue a legal malpractice claim against respondent on behalf of the estate. Benson further contends that respondent has waived any issue with regard to his standing or capacity to participate in this proceeding, as no such defense was raised in respondent's answer and Benson has been fully participating in discovery for the past year with no objections raised by respondent during that time. Benson contends that he would be prejudiced by the granting of this motion, having expended time and money into the prosecution of this claim for over a year, whereas respondent would be unfairly advantaged by such a determination.

As respondent points out, however, no motion was ever made to amend the petition to add Benson as a petitioner in this proceeding which respondent could oppose on the ground that Benson was not a proper party. Since April 2018, however, Benson has participated in this proceeding as a petitioner. With his opposition papers to the instant motion, Benson provides various discovery documents created by respondent which identify Benson as petitioner. In addition, Benson filed the note of issue in this proceeding as petitioner without any objection by respondent.

It is well settled that the defense of lack of standing is waived when not asserted in an answer or a timely motion to dismiss (see CPLR 3211 [e]; Matter of Prudco Realty Corp. v Palermo, 60 NY2d 656, 657 [1983]; Caliber Home Loans Inc. v Xiu Lian Tang, 172 AD3d 476, 476 [1st Dept 2019]; GHI Mktg., Inc. v Diven, 170 AD3d 814, 815 [2d Dept 2019]; U.S. Bank N.A. v Denaro, 98 AD3d 964, 964-965 [2d Dept 2012]). Here, respondent specifically addressed the issue of Benson being added as a party in its answer and deferred to the Court's discretion. If respondent objected to Benson being added as a party, that objection should have been raised in its answer filed in early 2018 (see Matter of Pritchett, 128 AD3d 836, 837 [2d Dept 2015]). To

provide the relief requested now, two months before this proceeding is scheduled for a jury trial, after Benson has been engaged in discovery with the other parties to this proceeding for the past sixteen months, would be prejudicial to both petitioner and Benson.

Even if respondent had not waived the argument that Benson lacks standing, the Court would not be persuaded. While it is generally true that “a third party, without privity, cannot maintain a claim against an attorney in professional negligence, ‘absent fraud, collusion, malicious acts or other special circumstances’” (Estate of Schneider v Finmann, 15 NY3d 306, 308-309 [2010], quoting Estate of Spivey v Pulley, 138 AD2d 563, 564 [2d Dept 1988]), the Court of Appeals recognized that such a rule “leaves [a decedent’s] estate with no recourse against an attorney who planned the estate negligently” and whose negligent actions or inactions affected the estate (Estate of Schneider v Finmann, 15 NY3d at 309). Accordingly, the Court established an exception to the rule for personal representatives of an estate, finding that such persons have privity, or a relationship sufficiently approaching privity, with the estate planning attorney (see id.). The Court reaffirmed that “strict privity remains a bar against beneficiaries’ and other third-party individuals’ estate planning malpractice claims absent fraud or other circumstances.” (id. at 310). Here, Benson is participating in this proceeding as a court-appointed fiduciary, and not as a beneficiary of the estate.

This Court finds that Benson, in his role as a co-administrator of the estate, has a relationship sufficiently approaching privity with respondent, counsel for the initial estate administrator, to maintain a claim against respondent for professional malpractice it may have committed with respect to the administration of this estate (cf. Estate of Schneider v Finmann, 15 NY3d at 209). Any remaining contentions, to the extent not specifically addressed, have been considered and determined to lack merit. It is hereby

ORDERED that respondent Weitz & Luxenberg's motion pursuant to CPLR 1003 for an order dropping Robert Thomas Benson for misjoinder is denied; and it is further

ORDERED that Robert Thomas Benson, as co-administrator, is a petitioner in this proceeding and the caption shall be amended as follows:

In the Matter of the Application of CATHERINE L. BENSON and ROBERT THOMAS BENSON, as Co-Administrators of the Estate of GUSTAVE ANDREW BENSON, Deceased, For an Order and Relief Pursuant to SCPA 2103 for Discovery and to Recover Property from Weitz & Luxenberg, P.C.

Dated and Entered:

Hon. Stacy L. Pettit, Surrogate

Papers Considered:

- 1) Notice of Motion by Respondent Weitz & Luxenberg, dated June 26, 2019; Affirmation in Support of Respondent's Motion by Peter J. Moschetti, Jr., Esq., dated June 26, 2019, with Exhibit 1; Memorandum of Law dated June 26, 2019;
- 2) Affirmation in Opposition of Michael E. Basile, Esq., dated July 9, 2019, and exhibits; Affidavit in Opposition of Robert Thomas Benson, dated July 5, 2019; Memorandum of Law dated July 9, 2019; and
- 3) Reply Affirmation of Peter J. Moschetti, Jr., Esq., dated July 17, 2019.